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No. .....

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

In the Matter of KENNETH P. LA VALLE and LEON J. CAMPO,

Appellants,

- against -

WILLIAM J. CANARY and GEORGE WOLF, as Commissioners of Elections, Suffolk County Board of Elections,

Appellees,

and IRA P. COSTELL,

Intervenor-Appellee,

In the Matter of JAMES J. LACK, JULIETTE A. KINSELLA, CAESAR TRUNZO, OWEN H. JOHNSON, GERALD D'EMILIO, ARMAND ARAUJO, DONALD KITSON, EDWARD U. GREEN, JR., JEFFREY A. BUTZKE, and LEROY E. DeBOARD

Appellants,

- against -

WILLIAM J. CANARY and GEORGE WOLF, as Commissioners of Elections, Suffolk County Board of Elections,

Appellees,

THOMAS J. DOWNEY and WARREN CROSS,

Intervenor-Appellees.

ON APPEAL FROM THE COURT OF THE APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is New York Election Law Section 7-104(5) and (6) violative of freedom of speech and equal protection provisions of the United States Constitution insofar as it denies candidates, other than candidates for governor or member of assembly, a separate, independent line on the ballot as the candidate of an independent body or group, when a candidate has obtained the nomination of two political parties, and allows candidates for governor or member of assembly to obtain as many separate lines as such candidates submit petitions qualifying for such independent lines?

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KENNETH P. LA VALLE, and LEON J. CAMPO, and JAMES J. LACK, JULIETTE A. KINSELLA, CAESAR TRUNZO, OWEN H. JOHNSON, GERALD D'EMILIO, ARMAND ARAUJO, DONALD KITSON, EDWARD U. GREEN, JR., JEFFREY A. BUTZKE, and LEROY E. DeBOARD, appeal from the final judgment of the Court of Appeals of the State of New York, dated December 20, 1986, holding that New York Election Law Section 7-104 (5) and (6) as applied in this case, is constitutional and not violative of Appellants' right of free speech or equal protection as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

—o—

OPINIONS BELOW

The orders of the Court of Appeals dismissing the appeals for want of a substantial constitutional question are not yet reported, and may be found in the appendix at App. 3, 4. The opinions and orders of the Appellate Division are reported at — A.D.2d —, 507 N.Y.S.2d 412 and 507 N.Y.S.2d 606 and are reproduced in the appendix at App. 5-7.

—o—

JURISDICTION

The judgment of the New York Court of Appeals was rendered on December 19, 1986. App. 3, 4. Notice of Appeal to this Court was duly filed with the Clerk of the New York Court of Appeals on or about January 19, 1987. App. 1-2.

This appeal is being docketed within 90 days from the dismissal of the appeal by the New York Court of Appeals.

Under New York law, the dismissal constituted an adjudication on the merits, sustaining the constitutionality of the statute. *Matter of Capoccia,* 59 N.Y.2d 549, 553, 453 N.E.2d 497, 498 (1983). Thus, since the dismissal by the New York Court of Appeals was for want of a substantial constitutional question, it amounts to an affirmance and the order of dismissal constitutes the judgment reviewable by this Court. *R.J. Reynolds Tobacco v. Durham, N.C.,* — U.S. —, 107 S. Ct. 499, 506 (1986); *Tumey v. Ohio,* 273 U.S. 510, 515 (1927). The jurisdiction of this court is invoked under 28 U.S.C. 1257(2).

—o—

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

(reproduced in appendix)

1. United States Constitution, First Amendment
2. United States Constitution, Fourteenth Amendment
3. New York Election Law Section 7-104(5) and (6)

—o—

RAISING THE FEDERAL QUESTION

At the earliest stage of the proceedings below, Appellants raised the claim, in their petitions to Supreme Court, Suffolk County, the initial pleading, that Election Law Section 7-104(5) and (6) was unconstitutional, as violative of the First and Fourteenth Amendments to the United States Constitution. The claim was explicitly rejected by the Supreme Court, which entered judgments declaring the statute constitutional in all respects.

The contention was renewed in all New York appellate Courts. The Appellate Division, affirming the judgments, again found the statute constitutional. The Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly presented."

———o———

STATEMENT OF THE CASE

Appellants, other than LEON J. CAMPO, were candidates for public offices other than Governor or Member of Assembly at the November, 1986 New York General Election. Appellant LEON J. CAMPO is Chairman of the People's Action Coalition, an independent association dedicated to educating the public to the dangers which would attend the operation of a nuclear power plant at Shorham, Long Island.

Under New York Law, there are presently five recognized political parties—Democratic, Republican, Conservative, Liberal, and Right-to-Life—each having achieved that status by obtaining 50,000 votes for governor in a general election. See New York Election Law Section 1-104(3); *Johnson v. Cuomo,* 595 F. Supp. 1126, 1129 (N.D.N.Y. 1984); *Matter of Amter v. Flynn,* 275 N.Y. 396, 9 N.E.2d 975 (1937); *Melzer v. Isaacs,* 82 N.Y.S.2d 18, 20 (Sup.Ct. N.Y. Co. 1984) (n.o.r.). Independent political bodies or groups may obtain a place on the ballot by filing a sufficient number of signatures. New York Election Law Section 6-142. When a candidate, other than a candidate for Governor or Member of Assembly, has received the endorsement of two recognized parties, however, the candidate cannot obtain a separate row or column for the independent

line. Candidates for Governor or Member of Assembly, however, can receive as many lines as they can qualify for by filing the requisite number of signatures. New York Election Law Section 7-104(6).

In this proceeding, four of the appellants (Johnson, Lack, LaValle, and Trunzo) were incumbent members of the New York State Senate. In seeking reelection during the general election of November, 1985, they submitted nominating petitions to appear on an additional independent line, which petitions were valid in all respects under New York Law. However, due to the prescription of New York Election Law, they were prohibited from appearing as a candidate of the independent body. Parties seeking office of member of the New York State Assembly assuredly were not similarly precluded.

Appellant-candidates received the nomination of the Republican and Conservative parties and also obtained a sufficient number of signatures to be nominated as the candidates of, an independent body, the concerned citizens against LILCO Party (CCAL). Thus, under New York Law, they could appear on the ballot as the separate candidates of the Republican and Conservative Parties only. Assembly candidates, however, could appear on all lines obtained, two major parties *plus* independent lines.

Asserting his rights and the rights of the coalition, LEON J. CAMPO duly filed objections with the Suffolk County Board of Elections concerning the Board's intention to invoke the provisions of Election Law Section 7-104 against Appellant KENNETH P. LA VALLE. Campo urged that the statute conflicted with freedom of speech

and association rights guaranteed by the United States Constitution as well as the equal protection clause.

When the Board of Elections declined to offer to appellant—candidates a separate row or column in connection with the CCAL nomination, the candidates and Mr. Campo commenced these proceedings. The trial court held the statute constitutional in all respects, in a brief memorandum. The Appellate Division, Second Department, affirmed, on an appeal transferred to it by the Court of Appeals. 68 N.Y.2d 849, — N.E.2d — (1986); — A.D.2d —, 507 N.Y.S.2d 412, 507 N.Y.S.2d 606 (2d Dept.). An appeal from the Appellate Division order was dismissed for lack of a substantial constitutional question. — N.Y.2d —, — N.E.2d — (1986). Although the election has been held, the issue is not moot. *Anderson v. Celebrezze,* 460 U.S. 780, 784 n.3 (1983); *Storer v. Brown,* 415 U.S. 724, 737 n.8 (1974).

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THE QUESTION IS SUBSTANTIAL

Section 7-104 of the New York Election Law is Violative of Freedom of Speech and Freedom of Association Protections of the United States Constitution

In *Williams v. Rhodes,* 393 U.S. 23 (1968), challenge was made to Ohio elections laws, which imposed severe obstacles on the ability of independent and new political parties to place electors for President and Vice President on the ballot. In voiding the Ohio statutes, Justice Black employed both Equal Protection and First Amendment analysis, using what has become classic language, 393 U.S. at 30, 31:

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment . . .
>
> . . . The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' (quoting *NAACP v. Button,* 371 U.S. 415.)

Just this term this court reiterated the standard of review to be followed. See *Tashjian v. Republican Party,* — U.S. —, 107 S.Ct. 549 ("constitutional challenges to specific provisions of a states election laws . . . . cannot be resolved by any litmus-paper test . . . "). Once an injury of constitutional magnitude is shown, the burden shifts to the state to justify the enactment. It must prove a compelling state interest is to be protected. This court explicitly recognized that the freedom to join together in furtherance of common political beliefs is an important public right of free association.

Cases following *Rhodes, supra,* emphasized that it was not limited to its facts, but rather, set forth principles of general application. In *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979), for example, the Court held the Illinois Election Code unconstitutional insofar as it imposed additional burdens upon independent and new political parties seeking to obtain a position on the ballot for municipal elections in the City of Chicago. The Court explained that while States have a legitimate interest in limiting ballot access to bonafide candidates, in doing so, prior opinions, which it quoted, "required that States adopt the least drastic means to achieve their ends." *Id.,* at 185:

> The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of our Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating political ideas as well as attaining political office . . . . Overbroad restrictions on ballot access jeopardize this form of political expression. *Id.,* at 185-186.

Anderson v. Celebrezze, 460 U.S. 780 (1982), refined the Court's approach to State statutes limiting ballot access. Reviewing and collecting its earlier cases, the Court emphasized that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.,* at 786, quoting *Bullock v. Carter,* 405 U.S. 135, 143 (1972). "[V]oters can assert their preferences only through candidates or parties or both . . . " *Ibid.*

The "exclusion of candidates also burdens the voter freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Id.*, at 787-88. Following a careful review of prior decisions, the Court set forth the following analytical framework. *Id.*, at 789-90:

> Constitutional challenges to specific provisions of a State's election laws cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. *Storer* [*v. Brown*], 415 U.S. [724,] at 730, . . . instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. *See Wiliams v. Rhodes*, . . ., 393 U.S. 23 at 30-31 *Bullick v. Carter*, 405 U.S., at 142-143 . . ., *American Party of Texas v. White*, 415 U.S. 767, 781 . . .; *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183 . . . The results of this evaluation will not be automatic; as we have recognized, 'there is no substitute for the hard judgments that must be made.' *Storer v. Brown, supra*, 415 U.S., at 730.

In this case, the question of whether a nuclear power plant should be permitted to operate at Shoreham is ob-

viously a matter of public debate in New York, *see, e.g., Matter of Prospect v. Cohalan,* 65 N.Y.2d 687, 481 N.E.2d 251 (1985); *cf.* New York Public Authorities Law Title 1-A, added by L. 1986, ch. 517, and an especially important one to the citizens of Suffolk County. *See Long Is. Light Co. v. County of Suffolk,* 119 A.D.2d 128, 500 N.Y.S.2d 956 (2d Dept.) *app. dsmd., lv. den.,* 68 N.Y.2d 607, 802, 498 N.E. 2d 429 (1986), voiding a local law to take over LILCO. An election campaign, at which *some* candidates will have the backing of independent bodies that identifies their stand, plainly serves as an "effective platform for the expression of views" on that issue. *Anderson v. Celebrezze, supra,* at 788.

Indeed—and this is critical—the independent "Concerned Citizens against LILCO" row or column provides a voter with a powerful, and perhaps the only, vehicle which a voter may assert a preference and a candidate can measure public sentiment on this issue. When a vote is cast on the independent "Concerned Citizens against LILCO" row or column, it is evident that the basis of that vote rests upon the candidate's position on LILCO issues —such as the power plant. Such an independent vote thus has quite a different meaning from one cast on a major political line, where there is no method by which a candidate can ascertain the basis for the vote. All votes are lumped together. The independent voter is thus deprived of a means of assurance that his or her independent vote counts. In *United Ossining Party v. Hayduk,* 357 F. Supp. 962, 967 (S.D.N.Y. 1971), the three Judge District Court noted that many voters, in such circumstances, will vote for a candidate on the independent line, but not a major party line.

There is an even greater unfairness and a patent chilling of constitutional rights when *some* candidates can obtain an independent "issue-related" line—such as an assembly candidate or another major party candidate who eschews the Conservative, Liberal or Right-to-Life lines. In such instances, an independent voter may be faced with the choice of casting a ballot for a candidate who might be a second choice if that independent voter deems it more important to have his or her vote counted on the social issue than for the candidate.

According to the New York Court of Appeals opinion in *Matter of Battista v. Power*, 16 N.Y.2d 198, 211 N.E.2d 821 (1965)[1], the purpose of the Election Law Section 7-104 is to prevent the major parties from pre-empting the ballot. *But see*, that Court's subsequent contrary statement in *Matter of Devane v. Touhey*, 33 N.Y.2d 48, 53, 304 N.E.2d 229, 231 (1973), to the effect that "no support" exists for such a position. If supported, undoubtedly, this is a legitimate State interest. But there are plainly less drastic means by which this can be accomplished. Among

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[1] In *Matter of Battista v. Power*, 16 N.Y.2d 198, 211 N.E.2d 821 (1965), a divided Court of Appeals held the predecessor statute "constitutional." The ruling was reaffirmed in *Matter of Button v. Donohue*, 18 N.Y.2d 792, 221 N.E.2d 913 (1966). Neither case discussed freedom of association or equal protection claims; apparently none were raised. In *Matter of Devane v. Touhey*, 33 N.Y.2d 48, 304 N.E.2d 229 (1973), the Court struck down an amended version of a predecessor statute as violative of the equal protection guarantees of the New York State and United States Constitutions. When the legislature amended the statute, thereafter, it was sustained against a general constitutional attack without comment. *Matter of Kiley v. Coveney*, 55 N.Y.2d 866, 433 N.E.2d 137 (1982), *affg.* 84 A.D. 2d 585, 443 N.Y.2d 736 (2d Dept. 1981).

others, the State could require more signatures on independent nominating petitions when a candidate has already received the nomination of a major political party, or preclude persons who witnessed the major party petitions from witnessing the independent petitions, disqualify voters who have registered as major party supporters from signing or carrying the independent petitions, or limit each candidate to a single independent line. *See, generally, Munro v. Socialist Workers Party,* — U.S. —, 107 S. Ct. 533 (1986); *Citizens for John Moore Party v. Bd. of Elect.,* 599 F. Supp. 662 (N.D. Ill. 1984); *Johnson v. Cuomo,* 595 F. Supp. 1126 (N.D. N.Y. 1984); *Stoddard v. Quincy,* 593 F. Supp. 300 (D. Maine 1984).

The statute under review itself establishes that the State is not seriously attempting to meet its purported objective. Assembly candidates face no limit on the number of independent lines they may obtain. The only requirement that such candidates need meet is that each independent petition contains 1,500 valid signatures. New York Election Law Section 6-142(g). Yet, the number of signatures required by statute for an independent Assembly candidate line is less than that fixed for the office of State Senator, if a State Senator is otherwise eligible to obtain the independent line. *See,* New York Election Law Section 6-142(f) (3,000 signatures needed to obtain independent line as State Senate candidate). It is thus difficult to fathom how an exemption for Gubernatorial and Assembly candidates meets a valid State objective within constitutional paramaters.

History supplies no valid predicate for the exemption. Assembly candidates and Senate candidates both function in the legislative branch of government and have been elected in the same fashion. Silvey, Apportionment in

New York, 30 Ford L. Rev. 581; Silvey, Apportionment of the New York Assembly, 31 Ford L. Rev. 1, 2. Even if history supported the distinction, "historical accident, without more, cannot constitute a compelling state interest." *Illinois State Board of Elections v. Socialist Workers Party, supra,* at 186.

The State simply has not met its burden of establishing a valid predicate for interference with the basic constitutional rights implicated. The statute should be set aside and the numerical signature requirement left to stand as the only barrier to the rights of independent voters. *See, Munro v. Socialist Workers Party,* — U.S. —, 107 S. Ct. 533, *supra.*

Election Law Section 7-104 is Violative of Equal Protection Rights of the Candidate and of the Independent Voter

As *Anderson v. Celebrezze, supra,* indicates, equal protection and free speech analysis tend to overlap somewhat when ballot access restrictions are subjected to judicial scrutiny. In *United Ossining Party v. Hayduk, supra,* the three-Judge District Court invalidated a predecessor to New York Election Law Section 7-104 on equal protection and freedom of association grounds, among others.[2] A similar analysis should lead to the same result here.

Simply put, there is no rational basis for the distinctions which the current version of the statute draws. An

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[2] The New York Court of Appeals struck down an amended version of a predecessor statute solely on the basis of the equal protection clauses to the State and Federal constitutions. *Matter of Devane v. Touhey,* 33 N.Y.2d 48, 304 N.E.2d 229 (1973).

Assembly or Gubernatorial candidate is not precluded from obtaining an independent line, irrespective of the number of political parties that endorse the candidate. The only limitation placed on these candidates is the number of signatures that must be obtained on each independent nominating petition. Yet, the number of signatures required for Assembly candidates is less than the number of signatures required for State Senate candidates. State Senate candidates, however, are faced with an insurmountable barrier if they are endorsed by a second major political party. They are absolutely barred by Election Law Section 7-104 from obtaining that independent line. So are candidates for offices which require the same number of signatures on independent nominating petitions as Assembly candidates.

The discrimination among candidates for the same office—such as State Senators—cannot be justified. A candidate for State Senate is faced with a proverbial Hobson's choice—the candidate must accept only the nomination of one major political party, if the candidate desires to obtain an independent row or column. Either a major political party—such as, the Conservative or Liberal parties—or independent voters must be offended. An opponent who is endorsed by only a single major political party may obtain an independent row or column notwithstanding. A candidate endorsed by two major political parties will thus have to face a challenger who can appeal for independent votes, which the candidate cannot.

The independent row or column serves the legitimate function of identifying the candidates' independent stand on a matter of current public debate, and a method by which an independent voter can insure that a vote on that

issue is meaningful, *i.e.*, based upon the candidate's position on a matter of public concern. If a vote is cast on the independent line, the candidate is made aware of the voter's opposition to the Shoreham nuclear power plant. If a vote is cast on a major party line, however, the basis of the vote cannot be ascertained, since all votes on the line are combined and none are segregated. When an adversary can obtain an independent row or column and use that independent row or column as a rallying point for voters to use their ballots to send a message on an issue of public debate, it is evident that candidate, who is precluded from obtaining a similar independent row or column, is deprived of equal protection of the laws, absent at least some constitutionally permissible reason.

No articuable reason, let alone a constitutionally permissible one, has been tendered here. If the predecessor statute construed in *United Ossining Party v. Hayduck, supra,* did not meet constitutional muster, then its successor suffers from the same defect.

———o———

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

---/

In the Matter of KENNETH P. LAVALLE, et al,

Appellants,

—against—

WILLIAM J. CANARY, et al,

Appellees,

and Ira Costell,

Intervenor-Appellee.

---/

In the Matter of JAMES J. LACK, et al,

Appellants,

—against—

WILLIAM J. CANARY, et al,

Appellees,

THOMAS J. DOWNEY, et al,

Intervenor-Appellee.

---/

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the appellants in the above captioned proceeding hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dismissing the appeal from an order of the Appellate Division of the Supreme Court, Second Judicial Department, which had sustained the constitutionality of New York Election Law

Section 7-104, upon the ground that no substantial constitutional question is directly involved, on December 19, 1986.

This appeal is taken pursuant to 28 USC Section 1257(2).

Respectfully Submitted,

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Dated: Lindenhurst, New York
January 16, 1987

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STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of December A. D. 1986

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-18 Mo. No. 1402 SSD 150B
In the Matter of Kenneth P. LaValle, et al.,

Appellants,

vs.

William ~~J.~~ Canary, et al.,

Respondents,

and Ira P. Costell,

Intervenor-Respondent.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

/s/ Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of December A. D. 1986

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

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2 Mo. No. 1355 SSD 150A
In the Matter of James J. Lack, et al.,

Appellants,

vs.

William J. Canary, et al.,

Respondents,

Thomas J. Downey, et al.,

Intervenors-Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

/s/ Donald M. Sheraw
Clerk of the Court

In the Matter of Kenneth P. LaVALLE, et al.,
Appellants,

v.

William J. CANARY, et al.,
Respondents,

Ira P. COSTELL, Intervenor-Respondent.

Supreme Court, Appellate Division,
Second Department.

Oct. 20, 1986.

Before THOMPSON, J.P., and BRACKEN, LAWRENCE and EIBER, JJ.

DECISION & ORDER

MEMORANDUM BY THE COURT.

In a proceeding, *inter alia*, to validate a petition nominating Kenneth P. LaValle as a candidate of the Concerned Citizens Against LILCO, an independent body, in the General Election to be held on November 4, 1986, for the public office of New York State Senator from the First Senatorial District, the appeals are from so much of a judgment of the Supreme Court, Suffolk County (Doyle, J.), dated September 10, 1986, as denied LaValle a separate row on the ballot for the Concerned Citizens Against LILCO, and declared Election Law § 7-104 constitutional in all respects. (By order dated October 9, 1986, the Court of Appeals transferred the appeal to this court, *sua sponte*.)

ORDERED that the appeal by the petitioner Leon J. Campo is dismissed, without costs or disbursements, for lack of standing (Election Law § 16-104[1]).

ORDERED that, upon the appeal by the petitioner LaValle, the judgment is affirmed insofar as appealed from by LaValle without costs or disbursements.

The petitioner Kenneth P. LaValle has been designated by two major parties, in this case the Republican Party and Conservative Party, in addition to having been designated by the Concerned Citizens Against LILCO, an independent body. As we have previously stated, "[i]t is well settled that section 7-104 of the Election Law denies an independent row to a candidate who already appears on the ballot as the candidate of at least two major political parties" (*Matter of Doyle v. Coveney*, 97 A.D.2d 527, 468 N.Y.S.2d 35; *see also, Matter of Kiley v. Coveney*, 84 A.D.2d 585, 443 N.Y.S.2d 736, *affd.* 55 N.Y.2d 866, 448 N.Y.S.2d 154, 433 N.E.2d 137). The constitutionality of Election Law former § 248, now § 7-104, has been upheld (*see, Matter of Battista v. Power*, 16 N.Y.2d 198, 201, 264 N.Y.S.2d 370, 211 N.E.2d 821; *Matter of Button v. Donohue*, 18 N.Y.2d 792, 793, 275 N.Y.S.2d 382, 221 N.E.2d 913). The challenged statute does not limit access to the ballot (*cf. Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547; *Illinois State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230) but merely permissibly regulates the positioning on the ballot of candidates cross-endorsed by more than one party and an independent body.

In the Matter of James L. LACK, et al.,
Appellants,

v.

William J. CANARY, et al.,
Respondents,

Thomas J. Downey, et al.,
Invervenors-Respondents.

Supreme Court, Appellate Division, Second Department. Oct. 20, 1986. ORDERED that the judgment of the Supreme Court, Suffolk County (Doyle, J.), dated September 16, 1986, is affirmed insofar as appealed from, without costs or disbursements. (*See Matter of LaValle v. Canary,* App.Div., 507 N.Y.S.2d 412.)

THOMPSON, J.P., and BRACKEN, LAWRENCE and EIBER, JJ., concur.

AMENDMENTS TO CONSTITUTION OF THE UNITED STATES

Amend. 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amend. 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ELECTION LAW § 7-104

* * *

5. (a) The names of all candidates nominated by any party or independent body for an office shall always appear in the row or column containing generally the names of candidates nominated by such party or independent body for other offices except as hereinafter provided.

(b) When the same person has been nominated for an office to be filled at the election by more than one

party, the voting machine shall be so adjusted that his name shall appear in each row or column containing generally the names of candidates for other offices nominated by any such party.

(c) If such candidate has also been nominated by one or more independent bodies, his name shall appear only in each row or column containing generally the names of candidates for other offices nominated by any such party and the name and emblem of each such independent body shall appear in one such row or column to be designated by the candidate in a writing filed with the officer or board charged with the duty of providing ballots, or if such person shall fail to so designate, the names and emblems of such independent bodies shall appear in such row or column as such officer or board shall determine.

(d) If any person shall be nominated for any office by one party and two or more independent bodies his name shall appear on the voting machine twice; once in the row or column containing generally the names of candidates for other offices nominated by such party, and once in the row or column containing generally the names of candidates nominated by the independent body designated by such person in a writing filed with the officer or board charged with the duty of providing ballots and in connection with the name of such person in such row or column shall appear the name and emblem of each independent body nominating him or, if such person shall fail to so designate, the name of such candidate and the names and emblems of such independent bodies shall appear in such row or column as such officer or board shall determine.

(e) If any person is nominated for any office only by more than one independent bodies, his name shall appear but once upon the machine in one such row or column to be designated by the candidate in a writing filed with the officer or board charged with the duty of providing ballots, or if the candidate shall fail to so designate, in the place designated by the officer or board charged with the duty of providing ballots and in connection with his name there shall appear the name and emblem of each independent body nominating him, but, where the capacity of the machine will permit, the name of such person shall not appear or be placed in a column or on a horizontal line with the names of persons nominated by a party for other offices.

6. Notwithstanding the provisions of subdivision five of this section, the name of a person who is nominated for the office of governor, or member of assembly, shall appear on the ballot labels of the machine as many times as there are parties or independent bodies nominating him, and there shall be a separate voting and registering device at each place in which such name shall appear.

* * *

No. 86-1342

Supreme Court, U.S.
FILED
APR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of KENNETH P. LA VALLE and LEON J. CAMPO,

Appellants,

—against—

WILLIAM J. CANARY and GEORGE WOLF, as Commissioners of Elections, Suffolk County Board of Elections,

Appellees,

—and—

IRA P. COSTELL,

Intervenor-Appellee.

In the Matter of JAMES J. LACK, JULIETTE A. KINSELLA, CAESAR TRUNZO, OWEN H. JOHNSON, GERALD D'EMILIO, ARMAND ARAUJO, DONALD KITSON, EDWARD U. GREEN, JR., JEFFREY A. BUTZKE, and LEROY E. DEBOARD,

Appellants,

—against—

WILLIAM J. CANARY and GEORGE WOLF, as Commissioners of Elections, Suffolk County Board of Elections,

Appellees,

THOMAS J. DOWNEY and WARREN CROSS,

Intervenors-Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

(For Appearances See Inside of Cover)

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Question Presented

Does New York Election Law, Section 7-104, afford candidates for certain public offices, who have been cross-endorsed by more than one political party as well as an independent body, freedom of speech and association, and equal protection of law under the United States Constitution, when it provides them access to two rows on the ballot, permits them to be identified on one such row as the candidate of an independent body, and merely withholds from them a third row on the ballot?

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No. 86-1342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of KENNETH P. LA VALLE and LEON J. CAMPO,

Appellants,

—against—

WILLIAM J. CANARY and GEORGE WOLF, as Commissioners of Elections, Suffolk County Board of Elections,

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—and—

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—against—

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Appellees,

THOMAS J. DOWNEY and WARREN CROSS,

Intervenors-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Intervenor-appellee, Robert Abrams, Attorney General of the State of New York, moves to dismiss this appeal on the ground that appellants have failed to present a substantial federal question.

Statement of the Case

Appellants, except for Leon J. Campo, were candidates for various public offices other than Governor or Member of the Assembly. Each was endorsed by two political parties as well as by an independent body, Concerned Citizens Against Lilco, Party ("CCAL"). The candidates' names appeared on two separate rows of the election ballot for the November 4, 1986 General Election as candidates of the Republican and Conservative Parties. The candidates were not afforded a separate and third row for their CCAL candidacy, but that body's name did appear on the ballot with appellants' names in either the Republican or Conservative rows.

Appellant, Leon J. Campo, joined in this action in his capacity as Chairman of the People's Action Coalition, an independent association opposed to the nuclear power plant at Shoreham by the Long Island Lighting Company ("LILCO").

In an effort to have their names appear in a third row on the ballot, as candidates of an independent body, appellants challenged New York Election Law, Section 7-104, on the grounds that it deprived them of their constitutional rights to freedom of speech and association and equal protection of law. In support of this claim, appellants alleged that because they were not given a separate and third row, independent voters were deprived of a means of expressing their opposition to the operation of the Shoreham Nuclear Plant. Appellants also claimed that because New York does not limit the number of rows provided a candidate for Governor or Member of the Assembly, [Section 7-104(6)], they were denied equal protection of the laws.

Appellants appeal to this Court from an order of the New York Court of Appeals, dated December 19, 1986, which dismissed appellants' appeal *sua sponte* upon the ground that "no substantial constitutional question is directly involved."[1] (App. 1)[2]

ARGUMENT

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

New York Election Law, Section 7-104, is fully consistent with decisions of this Court.[3] It provides that a candidate for public office, other than for the office of Governor or Member of Assembly, who is endorsed by more than one political party, as well as an independent body, shall be limited to two rows on the ballot. The section expressly provides, however, that the independent body's name and emblem shall appear in one of the two rows, as chosen by the candidate.[4] Because appellants clearly had access to the ballot, there is no substantial federal question for review and the appeal should be dismissed.

Appellants contend, nevertheless, that limiting them to two rows on the ballot impinges upon their rights to associate for political purposes, as well as the rights of voters to express their

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[1] The Attorney General of the State of New York intervened below pursuant to N.Y. Exec. Law §71 in support of the constitutionality of the challenged statute (App. 2).

[2] References to pages in the Appendix to the Jurisdictional Statement are indicated as (App. ____).

[3] This case is another in a long line of cases in which the New York courts have upheld Section 7-104 and its predecessor statutes as constitutional. *Matter of Button v. Donohue*, 18 N.Y.2d 792 (1966); *Matter of Battista v. Power*, 16 N.Y.2d 198 (1965); *Matter of Kiley v. Coveney*, 84 A.D.2d 585 (2d Dept. 1981), *aff'd*, 55 N.Y.2d 866 (1982); *Matter of Cherry v. Hayduk*, 49 A.D.2d 934 (2d Dept. 1975).

[4] The candidate designates in writing the row in which he or she wishes the name and emblem of the independent body to appear. Section 7-104(5)(c).

views effectively. It has consistently been held, however, that these associational rights are not absolute and "are necessarily subject to qualification if elections are to be run fairly and effectively." *Storer v. Brown*, 415 U.S. 724, 730 (1974), *cited in Munro v. Socialist Workers Party*, 107 S. Ct. 533, 536 (1986).

To determine whether a statute of this nature infringes upon constitutional rights:

> "[A] court ... must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."

Tashjian v. Republican Party, 107 S. Ct. 544, 548 (1986) (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Section 7-104 does not bar a candidate's access to the ballot, and does not infringe upon his right to associate for the advancement of common political objectives. First, the candidate's name appears in two separate rows on the ballot, and anyone wishing to vote for the candidate may thus do so. Second, the name of the independent body endorsing him and its emblem appear on the ballot in one of the two rows as designated by the candidate. Thus, neither the candidate nor the independent body is denied access to the ballot, and the candidate's association with the independent body is clearly established. Accordingly, the section does not injure appellants' first or fourteenth amendment rights.

The State's interest in limiting the number of rows permitted is twofold: (1) to prevent the major parties from preempting the ballot through the device of setting up independent

political bodies, *Battista v. Power*, 16 N.Y.2d at 201; and (2) to prevent voter confusion and ballot overcrowding by single issue independent bodies. Voter confusion and ballot overcrowding have been upheld as reasonable predicates for qualifying access to the ballot. *Munro v. Socialist Workers Party*, 107 S. Ct. at 538; *Storer v. Brown*, 415 U.S. at 736. A state is not required to prove actual voter confusion, ballot overcrowding or the presence of frivolous candidates as a predicate to imposing reasonable ballot access restrictions. *Munro v. Socialist Workers Party*, 107 S. Ct. at 537. To require such proof "would invariably lead to endless court battles over the sufficiency of the 'evidence' marshalled by the state to prove the predicate." 107 S. Ct. at 538.

> "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.*

Tashjian v. Republican Party, 107 S. Ct. 544, is not to the contrary. There, the Court, in striking down a statute which required voters in a political party primary to be registered members of that party, held that voter confusion was insufficient reason to restrict ballot access. However, the Court distinguished its holding from cases which have upheld the state's right to protect the integrity and reliability of the electoral process. The statute in *Tashjian* resulted in a "closed" primary *totally* barring nonmembers of the Party from voting in the primary, as distinguished from the statute challenged here which bars no one from voting for the candidate of his choice, and bars no candidate from the ballot.

Other decisions of this Court relied upon by appellants are equally inapposite. Those decisions involved state statutes that imposed more burdensome requirements on new political parties or independent groups than on established political parties and thereby limited their access to the ballot. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983) (Court invalidated Ohio early filing deadline applicable only to independent candidates for

President); *Illinois State Board of Election v. Socialist Workers*, 440 U.S. 173 (1979) (Court declared unconstitutional geographic classification which required more signatures for independent candidates seeking office in Chicago than for such candidates seeking state-wide office); *Williams v. Rhodes*, 393 U.S. 23 (1968) (Court invalidated Ohio early filing deadline and signature requirements applicable only to new political parties). In contrast, the pertinent subsections of 7-104 do not bar an independent body's access to the ballot, and do not prevent an independent body from placing their candidate before the electorate.

Appellant's argument with respect to equal protection must also fail. Equal protection requires only that persons similarly circumstanced be treated alike. *Plyler v. Doe*, 457 U.S. 202 (1982). Here, all candidates for the same office are limited by the same restrictions. Appellants were not running against candidates for the office of Governor or Member of the Assembly. Appellants implicit assumption that states must conduct elections for all offices in identical fashion is entirely unfounded. The "Equal Protection Clause does not require that a State ... choose between attacking every aspect of a problem or not attacking the problem at all" (citation omitted). *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

In any event, treatment of minority parties which does not exclude them from the ballot, prevent them from obtaining major party status, or prevent any voter from voting for the candidate of his choice, and which reasonably achieves important state objectives, does not violate the equal protection clause. *Board of Election Commissioners v. Libertarian Party*, 591 F.2d 22 (7th Cir.), *cert. denied*, 442 U.S. 918 (1979). Here, the State's objective, to preserve the integrity and reliability of the electoral process, is a constitutionally permissible predicate for qualifying access to the ballot, *Munro v. Socialist Workers Party*, 107 S. Ct. 533, and thus Section 7-104 does not violate the equal protection clause of the United States Constitution.

CONCLUSION

As appellants have failed to raise a substantial federal question, this Court should dismiss the appeal.

Dated: New York, New York
April 13, 1987

Respectfully submitted,
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